NO. 83-7714

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLIED BANK INTERNATIONAL, ETC.,

Plaintiff-Appellant,

v.

BANCO CREDITO AGRICOLA DE CARTAGO, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether United States policy supports giving controlling effect in United States courts to Costa Rican decrees suspending payment of external debt by Costa Rican government banks.

2. Even if giving effect to foreign law is found to be consistent with fundamental United States policy, whether international comity requires application of foreign law without regard to other choice of law factors.

3. Whether the act of state doctrine precludes judgment in this case on a contract enforceable in United States courts under United States law.

INTEREST OF THE UNITED STATES

This Court has granted rehearing of its ruling that comity requires that certain Costa Rican decrees prevent enforcement

of a loan contract by United States private banks against banks owned by the Costa Rican government, where New York is the place of payment under the contract. The United States has a strong interest in the decision in this case, which involves the legal framework applicable to the payment of billions of dollars of loans contracted by foreign governments and foreign private parties for which New York is the place of payment under the contract. The Court's opinion was apparently based upon an incorrect view that the application of Costa Rican law to prevent enforcement of appellant's contract, where Costa Rican law otherwise would not be applicable, was consistent with United States policies and was required by comity.

The United States has a substantial interest in this Court's interpretation of United States policy with respect to the manner in which Costa Rica and other countries deal with their external financing problems. The United States is particularly concerned that the new judicial framework adopted by the Court, extending the principles applicable to corporate bankruptcy proceedings to the balance of payments problems of sovereign states, could seriously undermine the effectiveness of the current framework for dealing with those problems. These problems are resolved through the voluntary cooperation by debtors and creditors, public and private, working together with international institutions, within the context of internationally agreed rules and policies for the adjustment of

payments imbalances. The current framework requires, as a critical element in correcting such payment difficulties, that needed commercial financing, to countries taking approriate economic adjustment measures, be sustained on a continuing basis. Judicial application of the Costa Rican decrees in United States courts is inconsistent with achieving these important United States objectives in maintaining an effective international financial system.

Second, the Executive Branch, which is directly and immediately involved in the conduct of international relations, has a strong interest in the proper application of principles of comity, which are grounded in considerations of international relations. Specifically, the United States is concerned that giving effect in the United States to a foreign law on the grounds of comity, solely because the law is consistent with the policy of the United States as determined by the court, would ignore legitimate interests of the forum state. Such interests include the interests of the United States government, and constitute an important part of modern choice of law analysis.

Third, the United States has a strong interest in avoiding improper application of the act of state doctrine, which was applied by the district court in this case and which is relied upon in the alternative by defendants (see Opposition to Rehearing at 23-24). Under the act of state doctrine, United States courts do not inquire whether an action of a foreign state, effective within the territory of that state, is valid or consistent with the law or policy of the United States. The

United States is concerned that the doctrine not be extended beyond its current, limited scope.

STATEMENT OF THE CASE

The defendants in this case are banks, owned by the Costa Rican Government, that defaulted in 1981 on loans from a syndicate of 39 United States banks. The default occurred after Costa Rican authorities determined that Costa Rican entities would pay external debt only with the express approval of the Costa Rican Central Bank, which declined to approve payments on the subject debts. The syndicate brought suit in the United States District Court for the Southern District of New York for full payment of the amounts due and payable in New York. The district court ruled that the act of state doctrine applied, 566 F.Supp. 1440 (S.D.N.Y. 1983), and subsequently dismissed the suit. The district court reasoned that the conduct of the Costa Rican government which prevented payment of the notes was public in nature, rather than commercial, and that its purpose was to serve a governmental function. 566 F.Supp. at 1443. The district court applied the act of state doctrine because it found that a judgment against defendants would "put[] the judicial branch of the United States at odds with policies laid down by a foreign government on an issue deemed by that government to be of central importance," and that "[s]uch an act by this court risks embarrassment to the relations between the executive branch of the United States and the government of Costa Rica." 566 F.Supp. at 1444.

After the district court's dismissal of the case and before the filing of the appeal, 38 of the 39 banks in the syndicate

agreed to a rescheduling of the underlying debts of defendant banks. The Central Bank is continuing to withhold approval for payments to meet the debts owed the one plaintiff bank which has not agreed to the rescheduling.

On appeal, this Court affirmed the district court's dismissal. 733 F.2d 23 (2d Cir. 1984). The Court did not address appellant's argument that the act of state doctrine did not apply because the situs of the obligations was in New York. 733 F.2d at 26. Instead, the Court held that regardless of the situs of the obligations, "the actions of the Costa Rican government will still be recognized as valid in United States courts if they are consistent with the law and policy of the United States." Id. The Court held that the Costa Rican exchange decrees that resulted in the prohibition of payments on external debts were consistent with the "law and policy of the United States" and that comity considerations demanded that the actions be given effect in the courts of the United States.

The Court compared the rescheduling of debts owed by Costa Rican entities to external creditors to a corporate reorganization. The provisions of Chapter 11 of our Bankruptcy Code for an automatic stay of all collection actions against a business filing an application for reorganization, to allow the business to prepare an acceptable plan for the reorganization of its debts, were found to be analogous to "Costa Rica's prohibition of payment of debt [which] was merely a deferral of payments while it attempted in good faith to renegotiate its obligations." Id. The Court also relied upon "support voiced

for the renegotiation by both the legislative and executive branches of our government." 733 F.2d at 26-27.

Appellant filed a timely petition for rehearing, and the United States supported the petition as amicus curiae. This Court granted rehearing on July 3, 1984.

ARGUMENT

I. GIVING CONTROLLING EFFECT AS A MATTER OF COMITY TO THE COSTA RICAN SUSPENSIONS OF PAYMENTS IN UNITED STATES COURTS CONFLICTS WITH IMPORTANT UNITED STATES POLICY INTERESTS IN THE EFFECTIVE FUNCTIONING OF THE INTERNATIONAL FINANCIAL SYSTEM.

The Court's holding in this case was based on the premise that comity required it to respect the Costa Rican decrees because such respect was consistent with the policy of the United States. This was error because giving controlling effect to the decrees is inconsistent with United States policy.[1] The United States supports the cooperative and negotiated resolution of international debt problems within a context in which legal principles require enforcement of international loan agreements. Substantial alteration of these legal principles

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[1] The United States has a direct and substantial interest in the effective functioning of the international financial system. The interests and policies of the United States in the international system may constitute an overriding federal comity requirement which the Courts will apply as federal common law. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424-27 (1964); Zschernig v. Miller, 389 U.S. 429 (1968). See generally, Maier, The Bases and Range of Federal Common Law in Private International Matters, 5 Vand. J. Trans. L. 133 (1971); Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Col. L. Rev. 1024 (1967); Moore, Federalism and Foreign Relations, 1965 Duke L. J. 248. No such interests or policies require the application of the Costa Rican decrees in this case.

changes expectations in a way that renders contractual relations less certain, thereby discouraging needed further lending. Moreover, establishment of a new judicial process for international debt restructurings may encourage debtor countries to rely on this process to obtain concessions from their creditors rather than to negotiate lasting solutions to their financial problems.

In the international financial system, private commercial institutions play a predominant role, with governments and international institutions facilitating largely private financial flows through a framework of cooperation in domestic and international economic policies.[2] In particular, it is through financial flows from lenders and investors to borrowers and users of capital that world trade and economic growth is sustained.

In recent years, a substantial number of countries--including Costa Rica--have faced serious external payment difficulties, threatening the international financial and

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[2] The system, as we know it today, has been in place for close to 40 years. Countries, confronted with the self-defeating competitive trade and monetary policies of the 1930's, established a number of international institutions in the 1940's to promote cooperation in governmental policies to facilitate world trade, investment, and finance. In particular, the International Monetary Fund (IMF), through which countries can coordinate and collaborate in the solution of international monetary problems, has facilitated resolution of countries' external financing problems, under internationally agreed rules, since its establishment in 1945.

trading system as a whole.[3] As described by the Managing Director of the IMF:

> Not only were the problems facing some debtor countries severe but their prospects for tackling those problems in an orderly way were clouded by the deep recession in the world economy as well as by a sharp curtailment of new commercial lending. It was crucial that the problems be tackled quickly, in a cooperative manner, and in a way that was consistent with the preservation of the liberal trade and payments system.

J. de Larosiere, Remarks before the Institute of Foreign Bankers, May 2, 1984, 13 IMF Survey 145, 146 (May 21, 1984). Debtors and creditors, both public and private, recognized a community of interests in resolving this problem.[4] A common strategy of voluntary cooperation was engendered by this

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[3] Gilpin, The Maze of Latin America's Debt, N.Y. Times, March 13, 1983, §3, at 4; Atkinson, International Lenders Debate Likelihood of New Wave of Trouble, Washington Post, May 15, 1983, §F, at 4.

[4] As the IMF Managing Director stated:

> As it turned out, a growing realization developed that any workable solution necessitated broad support and that it was in the vital interest of all parties to cooperate. Orderly adjustment by heavily indebted countries in a sluggish world economy and in the absence of adequate financing flows would have been impracticable. At the same time, the interdependence of the global financing and trading system meant that all parties would lose--and lose heavily--in the event of defaults and the interruption of financial flows and proliferation of trade and payments restrictions that would inevitably have ensued.

13 IMF Survey at 146.

interdependence. As described broadly by the IMF Managing Director, the strategy

> encompasses three elements: strong adjustment efforts by debtor countries, supportive and cooperative action on the part of the international financiers, and a revitalization of world trade to be achieved by a strengthening of policies by the industrial countries.

Id.

Debtor countries have generally developed economic adjustment programs approved by the IMF, while financing by the IMF and others has been provided to ease the pace at which the adjustment must be accomplished. The IMF, in accordance with longstanding policies sanctioned under its Articles of Agreement, has served as an objective mediator in the establishment of external financing requirements, and accordingly has frequently been a catalyst in mobilizing the financing essential to the viability of these programs. The IMF has emphasized to private creditors their critical role in rescheduling existing credit and providing new financing if the adjustment process is to succeed.[5] United States policy has

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[5] This approach has in fact worked well. As of June, 1984, 34 countries had current economic adjustment programs with the IMF. J. de Larosiere, Remarks before the International Monetary Conference, June 4, 1984, 13 IMF Survey 178 (June 18, 1984). Rescheduling of official and commercial debt was arranged for a large number of countries. In 1983 alone, some 30 countries, including 11 of the 25 largest borrowers, completed or were engaged in debt rescheduling with official or commercial creditors. Id. It was also possible to muster the essential commercial bank lending to support countries' effort to adjust--a prospect that was in real jeopardy in late 1982. Commercial bank exposure in these countries increased in 1983 by

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been strongly supportive of this approach to resolve the current international debt problem.[6]

Moreover, the United States policy actions with respect to Costa Rica's external payments difficulties were fully

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[5] (FOOTNOTE CONTINUED)

approximately $20-25 billion. Id. Moreover, commercial banks have developed and expanded their cooperation through advisory committees and regional groupings designed to enhance creditor coordination with each other and each debtor country concerned. 13 IMF Survey at 179; see also Statement of Secretary Donald T. Regan before the Interim Committee of the Board of Governors of the IMF, April 12, 1984, at 5-6, Treasury Department Press Release R-2632.

For a brief description of the manner in which this cooperative framework resolved Mexico's 1982-83 financing difficulties, see Mercaldo, Mexico, One Country's Attempt at Dealing with the International Liquidity Crisis, 3 The World of Banking 9 (1984).

[6] As stated in its brief in support of rehearing in this case, the United States supports (1) economic adjustment by borrowing countries designed to stabilize their economies and restore sustainable external positions; (2) an IMF adequately equipped to help borrowers design economic adjustment programs and provide temporary financing while adjustment programs take effect; (3) readiness of governmental monetary authorities in creditor countries to provide short-term liquidity support when essential to assist selected borrowers that are formulating adjustment programs with the IMF; (4) encouragement of private markets to provide prudent levels of financing to borrowers in countries implementing such economic programs; and (5) resumption of sustainable, non-inflationary economic expansion and maintenance of open markets, both in industrial countries and developing countries facing debt problems. U.S. amicus brief at 4-5; Statement of Donald T. Regan, Secretary of the Treasury, Hearings before the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs, on Proposals for Legislation to Increase the Resources of the International Monetary Fund, 98th Cong., 1st Sess. at 7-8 (February 14, 1983); Statement of Paul A. Volcker, Chairman, Federal Reserve Board of Governors, Hearings before the House Committee on Banking, Finance, and Urban Affairs, 98th Cong., 1st Sess. at 41-68 (February 2, 1983).

consistent with this broader U.S. policy. Provision of government financing, rescheduling governmental credits, and encouragement of commercial creditors voluntarily to restructure their loans to Costa Rica in the context of adoption of corrective economic measures by that country, were in complete harmony with the general approach described for correcting payments imbalances of debtor countries.[7]

There is thus a process in place for resolving economic adjustment problems such as Costa Rica's. It is a process that adequately balances the interests of creditors and debtors, public and private, generally in the framework of an IMF-approved adjustment program, and which relies for solutions on the voluntary cooperation of each. This process is impaired,

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[7] As explained in our brief in support of rehearing, the actions of the executive and legislative branches relied upon by this Court (733 F.2d at 25-26) do not indicate that it is the policy of the United States that a private commercial loan contract on which suit is brought in the United States should not be enforced. The President's certification under the Foreign Assistance Act dealt with continuation of U.S. assistance notwithstanding that the government of Costa Rica was in default on loans made to it by the United States under that Act, and did not deal with private commercial debt. The Paris Club Agreed Minute is a multilateral understanding among creditor nations recommending common terms for the bilateral restructuring of Costa Rica's debts to participating governments; with respect to private debt the Minute contains only a recommendation to the Costa Rican Government to seek restructuring of debt to private creditors on comparable terms. The concurrent resolution of the House of Representatives was a general statement of sympathy for the Costa Rican Government in responding to its economic crisis. None of these actions suggests that Costa Rican debt to private creditors should be rendered unenforceable by virtue of actions of the Costa Rican Government to which the creditors did not agree.

not aided, by judicial recognition of a country's unilateral suspension of external payments on debts expressly made payable in the United States. Instead of continuing to rely on the essentially voluntary and cooperative process of dealing with international financial problems, a process which has a longstanding record of effectiveness, the Court's opinion effectively sets up a new judicial framework--like that governing a corporate bankruptcy--to enforce the country-wide debt restructuring process.

In doing so, this Court relied on Canada Southern Ry. v. Gebhard, 109 U.S. 527 (1883). In Canada Southern, the Canadian Parliament had authorized a Canadian corporation to enforce upon its mortgage creditors a settlement by which the creditors were to receive other securities of the corporation in place of their mortgage bonds, without regard to the nationality of the creditors. The scheme was assented to by a large majority of the creditors. The Supreme Court held that the settlement was binding on U.S. citizen bondholders suing in U.S. courts. The Court reasoned in part that the Canadian scheme was analogous to bankruptcy proceedings under United States law. 109 U.S. at 539.[8]

The acts of the Costa Rican government, unlike the scheme at

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[8] Justice Harlan dissented, arguing that a foreign government could not destroy the contract rights of a U.S. citizen, that similar laws by a U.S. state would amount to an unconstitutional impairment of contract, and that the Canadian scheme was unlike U.S. bankruptcy proceedings in that the plaintiffs never had "their day in court." 109 U.S. at 543.

issue in Canada Southern, are not like bankruptcy proceedings. In domestic law, contract rights are generally preserved unless freely renegotiated by both sides or unless a previously recognized, neutral body (the bankruptcy court) modifies the contractual obligations. The Costa Rican acts are unlike bankruptcy because there is no previously recognized, neutral body, and, indeed, the body modifying the contractual obligations is the debtor itself. In Canada Southern, in contrast, the Canadian Parliament substituted in effect as a bankruptcy court for some purposes, and the Supreme Court relied on that fact. 109 U.S. at 539. There was no question of the Canadian government's modifying its own obligations.

The Costa Rican decrees prohibiting payment on external debt differ in crucial respects from a bankruptcy, in which the assets of the individual debtor are being managed by a fair and neutral bankruptcy authority in the interests of all creditors.[9] Rather, it is the debtor nation which is

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[9] Accepting Canada Southern, United States courts today probably would still not apply the comity principle to give effect to a foreign bankruptcy proceeding if it failed to meet fundamental procedural safeguards. A prohibition on payments on debt imposed by the debtor country itself would not appear to meet that requirement. The analogy would not be to a stay in bankruptcy pending agreement on a reorganization plan, but, rather, to a "cramdown" of a reorganization agreement between a debtor and a majority of its creditors on an unwilling minority. For such a case, Chapter 11 of the Bankruptcy Code provides elaborate procedural safeguards to protect the interests of minority creditors. These are, in the nature of things, absent in the case of a country's unilateral decision to halt payments on debt: there is no impartial procedural guarantee provided. Instead, the foreign country, acting in its

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suspending external payments by all obligors in the country to resolve its own balance of payments crisis. The normal expectation of lenders regarding their contracts with foreign entities payable in New York may reasonably be interpreted to include subordination of a right to enforcement in New York to the requirements of foreign bankruptcy proceedings. However, this Court's opinion amounts to an extension of the Canada Southern principle into a new area where it is not required, and indeed, where it seriously damages United States interests.[10]

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[9] (FOOTNOTE CONTINUED)

own interest and that of its nationals, refuses payment on external debt until the governing contractual terms have been amended to its satisfaction. In addition, no procedures exist to assure that minority creditors could petition an impartial third party any time they considered their interests were not adequately protected. Indeed, the Bankruptcy Code encourages equitable negotiated bargains through a system that rewards fairness and discourages inequitable plans by making them, inter alia, subject to costly and potentially risky motions, valuation proceedings and hearings. See Broude, Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative, 39 Bus. Law 441 (1984).

[10] This case is accordingly different from cases in which effect was given to foreign law, where it might not otherwise have been selected, because the United States itself had an affirmative interest in such a result. In Banco Nacional de Cuba v. Chemical Bank, New York, 658 F.2d 903 (2d Cir. 1981), this Court considered the effect of a Cuban nationalization decree on property located in the United States. The Court said that United States courts will give effect to foreign expropriations "when enforcement has promised to further, rather than violate, the policy aim of the United States." 658 F.2d at 908. The Court found that recognition of the Cuban expropriations would further United States policy, because allowing the Cuban government to sue would assist in providing funds in the United States from which United States nationals with valid claims against the Cuban Government would be compensated. Any funds recovered by the Cuban government

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Under the analysis used by the Court in this case, courts would need to determine when a sovereign's act to prevent payment on external debt constitutes a "deferral" of payments rather than a repudiation of the debts. The courts would also need to determine when a restructuring plan developed by the foreign government must be accepted by all creditors. If the United States courts attempt to assume this role in the restructuring process, the effect could well be to encourage debtors to use the courts to establish their "rights" to obtain concessions from their creditors, rather than addressing those problems through coordination, cooperation and needed economic adjustment measures.

Moreover, for the courts to try to dictate the terms of

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[10] (FOOTNOTE CONTINUED)

plaintiff would be subject to the foreign assets controls imposed by the Executive branch and frozen, pending distribution by the United States Foreign Claims Settlement Commission to American nationals determined to have valid claims against Cuba. 658 F.2d at 909.

There was also an affirmative interest in the application of foreign law in United States v. Belmont, 301 U.S. 324 (1937) and United States v. Pink, 315 U.S. 203 (1942). In those cases, the Supreme Court recognized the validity of Soviet Union nationalization decrees which nationalized property belonging to Russian citizens. The Supreme Court gave effect to the extraterritorial taking in deference to the foreign policy actions of the Executive Branch and as a matter of Constitutional separation of powers. Recognition of the Soviet decrees was contemplated by a valid executive agreement between the United States and the Soviet Union, and served to further the policy of resolving international claims against the Soviet Union incident to the recognition of the Soviet government. Pink, supra, 315 U.S. at 221-26. No such international agreement or affirmative foreign policy interest is present in the instant case.

contractual agreements between debtors and private creditors would jeopardize the cooperation of private creditors in the future. Such cooperation is critical to the economic growth of debtor countries.[11] Continued voluntary financing from private creditors is essential to resolve the financial problems of heavily indebted nations.

The Court's decision that comity precludes enforcement of the debts at issue will also have an adverse impact on levels of international lending because of the substantial uncertainty which the opinion causes in contractual relations. In this case for instance, the loan agreement specifically contemplated the possibility of Costa Rica imposing exchange controls that could interfere with the defendant banks' ability to make U.S. dollar payments. The debtor banks were excused from performance for that cause for periods up to ten days. App. 44-45. The risk of the unavailability of foreign exchange for a longer period accordingly appears to have been allocated to the debtor, not the creditor. However, based on this Court's decision, it is entirely uncertain when future courts may refuse to enforce international contracts in the United States when a foreign

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[11] The majority of financing to non-OPEC developing countries is provided by private commercial sources. We are informed by the Federal Reserve Board that in the period 1973-83, an average of 60% of all financing to non-OPEC developing countries was from such private creditors, and that in 1982, aggregate financing from private and official sources was $63 billion, while in 1983, the total was $58 billion. These amounts reflect a decline in commercial financing only partially offset by official flows.

government has imposed an exchange control for reasons of financial difficulty or expediency.

As stated by the IMF Managing Director in discussing some proposals put forward as "panaceas" to resolve the debt problem, rather than addressing each country's problem through the sometimes tedious coordinating process outlined above:

> [Such panaceas] could well cause certain lenders to turn away from the cooperative process and make it more difficult to maintain the cohesion that is needed to organize new financial packages. Indeed, these techniques must each be judged by their effectiveness and their capacity to keep the various financiers actively involved in the task of strengthening the international financial system.

J. de Larosiere, Remarks before the International Monetary Conference, June 4, 1984, 13 IMF Survey 178, 180 (June 18, 1984). Mr. de Larosiere also noted:

> Until such time as borrowing countries can regain access to the markets, it is important that all the banks--whether large or small and whether or not their foreign exposure is large--participate in the provision of new financing justified by sound adjustment programs; . . . . The very integrity of the system depends on such cohesion.

13 IMF Survey at 181.[12]

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[12] The possibility that a "rogue bank" can seriously undermine the debt restructuring process is a far lesser obstacle today to achieving successful resolution of these financial problems than is the possibility of decreased lending as a result of the Court's decision. Recent experience has demonstrated that few suits in fact are brought in circumstances where the foreign country is proceeding, in good faith, to resolve its debt problems. This may be due to several factors: realization by the creditors that orderly resolution of the debt problem is the best assurance of repayment in full; few assets of the debtor from which judgments may be satisfied; or peer pressure from

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In sum, by denying lenders enforcement of their loan contracts according to their terms, the Court introduces uncertainty in future international contractual relations and makes the adversarial context more attractive to the debtor than cooperation with all creditors and the IMF. Thus, the Court's decision undermines the established cooperative framework essential to continued success in dealing with international financial problems in the months and years ahead. The effect is therefore not to further United States interests, including interests in the international financial system, but to jeopardize those interests and important policy objectives. In such circumstances, comity cannot require the Court to give effect to the Costa Rican decrees, and to deny enforcement of the contractual rights of creditors to performance in the United States by defendant banks.

II. COMITY DOES NOT REQUIRE THE APPLICATION OF A FOREIGN LAW MERELY BECAUSE IT IS FOUND TO BE CONSISTENT WITH UNITED STATES POLICY.

The United States is also concerned that this Court's

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[12] (FOOTNOTE CONTINUED)

fellow creditors. In addition, syndicated loan contracts typically include provisions which make suit by any single creditor at an early stage financially less attractive. For example, the contract may provide that nonpayment of one or several payments of interest or principal may not trigger an acceleration of the maturity of all amounts outstanding unless a decision to accelerate is made by a majority of the participants in the loan. This clause may be coupled with a provision that any amounts recovered on a court judgment by a single participant must be shared ratably among all participants in a loan, thereby reducing further the financial incentive to engage in a "mad scramble for assets."

opinion may be read to require, without regard to a proper choice of law analysis, that any foreign decree be applied by a United States court solely on the ground that such a decree is found to be consistent with United States policy. 733 F.2d at 26. Such automatic application of foreign law is not required by recognized choice of law principles. International comity is of course a factor in a proper choice of law analysis, but that does not mean that it requires the application of the foreign rule once it is found to be consistent with United States policy.

The Supreme Court, in Hilton v. Guyot, 159 U.S. 113 (1895), explained the concept of comity as follows:

> "Comity," in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

159 U.S. at 163-64. The court thus made clear that comity is not an absolute requirement. See also, Somportex Limited v. Philadelphia Chewing Gum Co., 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

The manner in which this principle is employed to reach decisions differs with the situation and the forum in which the issue arises. In the sense most relevant to this case[13] the

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[13] Unlike the factual situation in Hilton, supra, the instant case involves a foreign governmental decree rather than a court judgment.

concept of comity is, essentially, embodied in ordinary choice of law analysis, in which consideration is given to the significance of the foreign jurisdiction's contacts with the case and the needs of the international system.[14] Restatement (Second) of Conflict of Laws, §§6 & 188.

For instance, New York choice of law, which emphasizes the "most significant contacts" with the transaction at issue, applies this approach. Fleet Messenger Service, Inc. v. Life Insurance Co. of North America, 315 F.2d 593, 596 (2d Cir. 1963); Intercontinental Planning Limited v. Daystrom Inc., 24 N.Y.2d 372, 300 N.Y.S.2d 817, 248 N.E.2d 576 (1969). In this analysis, a variety of important factors, in addition to the interest of the foreign state in the transaction, are considered. These include the relevant policies of the forum; the protection of justified expectations; the basic policies underlying the particular field of law; certainty,

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[14] The choice of law analysis which applies this kind of approach meets the normal requirements of comity. This Court apparently assumed that under New York choice-of-law principles, Costa Rican law would not have otherwise applied to the substantive issue in this case, unless special U.S. interests in the international system so dictated. The United States also assumes for the purposes of this brief that New York law applies, under a proper choice-of-law analysis, but takes no position on the matter. The cases suggest that New York law would be applicable. See United States v. Sonal, Inc., 573 F. Supp. 1126 (S.D.N.Y. 1983); Kristinus v. H. Stern Com. E Ind., S.A., 463 F. Supp. 1263 (S.D.N.Y. 1979); J. Zeevi & Sons v. Grindlays Bank., 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, cert. denied, 423 U.S. 866 (1975); Garcia v. Chase Manhattan Bank, N.A.., 2d Cir. No. 83-7530, March 28, 1984. As discussed in Point I, supra, there are no special national interests in the international system calling for a different result in this case.

predictability and uniformity of result; and ease in the determination and application of the law to be applied. Restatement (Second) of Conflicts of Law, §6.

In contract law, factors such as the protection of justified expectations and predictability of result are of particular importance. They form part of the basic policies underlying the field of contract law. Restatement (Second) of Conflicts of Law, §188, comment b. It is contrary to this modern choice of law analysis to apply the law of a foreign jurisdiction to any contract transaction with foreign contacts simply because that foreign law is found to be consistent with the policy of the forum, particularly where to do so would defeat the expectations of the parties and defeat substantial United States interests.

The cases relied upon in this Court's opinion (733 F.2d at 26) do not support such an automatic application of foreign law. We have already distinguished the cases involving an overriding affirmative interest of the United States favoring the application of foreign law: United States v. Belmont, 301 U.S. 324 (1937); Canada Southern Railway Co. v. Gebhard, 109 U.S. 527 (1883); and Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 658 F.2d 903 (2d Cir. 1981). See p. 12-14 & n. 10, supra. The standard set forth in the other cases relied upon was applied to deny effect to the foreign law in question. For example, in Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966), this Court stated:

> [W]hen property confiscated is within the United States at the time of the attempted

> confiscation, our court will give effect to acts of state "only if they are consistent with the policy and law of the United States."

Applying this rule, the Court declined to give effect to a foreign nationalization law. In United States v. Cosmic International Inc., 542 F.2d 868 (2d Cir. 1976), this Court adopted the Republic of Iraq rule and affirmed a district court decision denying effect to a decree issued by the Government of Bangladesh authorizing expropriation without compensation. Similarly, in Central Hanover Bank & Trust Co. v. Siemens & Halske AG, 15 F.Supp. 927 (S.D.N.Y.), aff'd, 84 F.2d 993 (2d Cir.)(per curiam), cert. denied, 299 U.S. 585 (1936), the district court refused to enforce in the United States, as a matter of comity, German restrictions on contract payments owed in the United States.[15]

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[15] Similarly, in J. Zeevi and Sons v. Grindlays Bank, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, cert. denied, 423 U.S. 866 (1975), the New York Court of Appeals refused to give effect in the United States to a Uganda exchange control judged to be confiscatory and discriminatory. Accord, Egyes v. Magyar Nemzeti Bank, 165 F.2d 539, 541 (2d Cir. 1948) (dictum) (judgment could be given in an American court against original issuers of bonds in Hungary, despite Hungarian government moratorium decrees prohibiting obligors from making payments abroad at maturity).

And in Second Russian Ins. Co. v. Miller, 268 U.S. 552 (1925), the Supreme Court refused to give extraterritorial effect to a Russian law forbidding Russian subjects to enter into commercial relations with citizens of enemy countries and proclaiming all such existing contracts at an end. The Court upheld the validity of payments made in the United States under a pre-existing contract which was illegal by the Russian decree. Indeed, the Court rejected the contention that the Russian decree should be given extraterritorial effect because

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Thus, the doctrine that a foreign law should be applied in the United States only if it is consistent with United States law and policy is a limiting doctrine, specifying when such law should not be applied notwithstanding other choice of law considerations. Accordingly, this rule is a final step in a choice of law analysis to deny application of a law which would otherwise be selected. Alternatively, as the courts have used the rule in the cases cited above, it may serve as a short-cut in determining that the foreign law will not be applied. It cannot reasonably be construed as a substitute for choice of law analysis in deciding whether a foreign law should be selected, since to do so would fail to give appropriate weight to the interests of the forum and other factors. Accordingly, it does not follow that comity automatically requires the application of foreign law, even if in some sense the foreign law is found to be consistent with United States policy. Of course, as we showed in Point I, enforcement of the foreign law is not consistent with United States policy in this case.

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[15] (FOOTNOTE CONTINUED)

> such an application of foreign law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined.

268 U.S. at 560.

III. THE ACT OF STATE DOCTRINE DOES NOT REQUIRE DISMISSAL OF THIS SUIT.

The district court relied upon the act of state doctrine to dismiss this suit, and defendants rely in the alternative upon that doctrine. Opposition to Rehearing at 23-24. As we now show, in order for the doctrine to apply to the enforcement of a contract debt, the foreign government's action must first affect a debt with its situs within that government's territory.[16] The requirement is not met in the instant case. Second, applying the act of state doctrine in this case does not further the underlying purpose of the act of state doctrine--avoiding the need for a United States court to examine the validity of, or otherwise to judge, a foreign government's action. No such examination or judgment of the validity of Costa Rica's actions is required by granting judgment in the instant case. The act of state doctrine accordingly does not preclude this suit.

The Supreme Court has repeatedly characterized the act of state doctrine in the following terms:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897), quoted in

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[16] This case does not require an answer to the question of whether the right to enforce the default provisions at issue constitutes property under the relevant law, or whether the Costa Rican suspension of external payments constituted a taking; there is in any event a requirement of territoriality which applies to contract rights and which precludes application of the act of state doctrine in this case.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (emphasis added). See also Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

The Supreme Court has explained that the doctrine has "'constitutional' underpinnings" in the "basic relationships between branches of government in a system of separation of powers":

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Sabbatino, supra, 376 U.S. at 423.

The act of state doctrine has led the courts to refrain from sitting in judgment on foreign governmental acts in many circumstances where foreign governments have expropriated property within their own territory. As the Supreme Court explained in Sabbatino:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government, extant and recognized by this country at the time of the suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428.

1. This Court correctly found that the act of state doctrine would not apply to this case if the situs of the debt were in

the United States. 733 F.2d at 26. In Sabbatino, supra, the Supreme Court established that one of the conditions for application of the act of state doctrine in taking cases, is "a taking of property within its own territory by a foreign sovereign government . . . ." 376 U.S. at 428. The Court applied the act of state doctrine to a case involving a claim against the proceeds from the sale of sugar expropriated by the Government of Cuba. In so doing, however, the Court proceeded on the explicit assumption that the act of state doctrine is inapplicable to a situation, such as in the instant case, in which a foreign state's action seeks to affect a contract right located outside its territory. 376 U.S. at 413 & n.14.

This Court has addressed the issue of the situs of a debt for act of state purposes consistently with the Sabbatino approach. In Menendez v. Saks and Company, 485 F.2d 1355, 1364-65 (2d Cir. 1973), rev'd on other grounds sub nom Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), this Court held the act of state doctrine inapplicable in an action by owners of expropriated Cuban cigar companies against United States importers to recover payments for cigar shipments. The Court stated: "For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it." 485 F.2d at 1364.[17] In analyzing the situs of the debt in Menendez the

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[17] The Menendez court ruled that the fact that the property
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Court noted that the business practice of the parties was that the payments would be made in dollars in New York. In concluding that the situs of the debt was New York, this Court reasoned that "where a contract or agreement authorizes performance in any of several places, the law governing the agreement is that of the place of performance actually chosen." 485 F.2d at 1366.

More recently, in Garcia v. Chase Manhattan Bank, N.A., ___ F.2d ___, 2d Cir. No. 83-7530, March 28, 1984, this Court held that the act of state doctrine did not apply to a suit by a Cuban citizen on a certificate of deposit purchased from Chase at its Havana branch, because the contract included a promise that the certificate could be redeemed at any Chase branch worldwide. This Court refused to allow Chase's defense that the Cuban Government had expropriated all of the assets of its Havana branch to defeat the legitimate expectations of the depositors that their funds would be secure from seizure.[18]

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[17] (FOOTNOTE CONTINUED)

was accounts receivable and therefore intangible was not a basis for distinguishing the result in Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966), involving tangible property. 485 F.2d at 1365. In Republic of Iraq the court held the act of state doctrine inapplicable because the property at issue was money deposits and shares of stock located in New York.

[18] The act of state doctrine would not necessarily apply in the instant case even under Judge Kearse's dissent in Garcia. She relied on the extinguishment of the debt in that case under Cuban law and the principle that a debt may be validly collected only once. No Costa Rican government action purports to extinguish debt in this case.

Where a sovereign state attempts to assert complete dominion over property not wholly within the sovereign's territory, this Court has been unwilling to recognize the act of state. In United Bank Limited v. Cosmic International, Inc., 542 F.2d 868 (2d Cir. 1976), this Court refused to recognize that the taking of jute mills by the new Government of Bangladesh included payments owed by American importers for jute shipped prior to the governmental decrees expropriating the mills. This Court reasoned:

> Where an act of state has not 'come to complete fruition within the dominion of . . . [a foreign] government', . . .; no fait accompli has occurred which would otherwise prevent an American court from reviewing the act's validity. More importantly, there is less likelihood that any ensuing judicial review would jeopardize this country's foreign relations.

542 F.2d at 874. Accord, Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715-16 (5th Cir. 1968), cert. denied, 393 U.S. 924 (1968).

In the instant case, the parties agreed that payments under the loan agreements would be made in New York in U.S. dollars. In addition, by agreeing to a ten-day grace period on payments in the event of the imposition of exchange controls, the parties clearly expected the debt to be enforceable in New York notwithstanding government imposed exchange controls. While the Costa Rican Government has nationality and territorial jurisdiction over the debtors, its jurisdiction over them is not exclusive, and it does not have territorial jurisdiction over the principal locus of the performance under the loan

agreements. Thus the place of performance, the stated expectations of the parties, and the lack of territorial jurisdiction of Costa Rica over the agreed locus of payment lead to the conclusion that the situs of the debt is New York. Under these circumstances the act of state doctrine is not applicable. The district court in Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F.Supp. 870, 874-84 (S.D.N.Y. 1983), reached the same conclusion on virtually identical facts, and its reasoning on this point is persuasive.

The Libra Bank court recognized that the Republic of Iraq, Menendez, and United Bank cases, all supra, involved a debt owed by a U.S. national to a foreign national, whereas Libra Bank (like this case) involved the attempt by a foreign nation to avoid payment of a debt which it concededly owes to its creditors. 570 F.Supp. at 880. The court concluded that for act of state purposes, the location of the debtor was not so important as the place where a court has personal jurisdiction over the debtor and thus can enforce the debt:

> even if a creditor can sue a debtor in his home in a foreign state that has the power to compel the indigenous debtor to pay his debt, a United States court may still find that the situs of the debt was in this nation at the time of the attempted confiscation.

570 F.Supp. at 881. The analysis is consistent with Harris v. Balk, 198 U.S. 215, 222-23 (1905) (a debtor "is as much bound to pay his debt in a foreign state when therein sued . . . as he was in the state where the debt was contracted" (emphasis added)). As in Libra Bank and as explained above, the

defendants in the instant case consented to the jurisdiction of United States courts (see App. 48), and the district court accordingly clearly had jurisdiction to enforce the debt judicially in New York absent the Costa Rican decrees. The reasoning of Libra Bank therefore precludes application of the act of state doctrine in this case as well.

2. The policies underlying the act of state doctrine moreover do not call for the application of the doctrine in this case. First, while the loan agreements embody the freely negotiated expectations of the parties, there is no well-established and deep-seated expectation of sovereign states that their respective laws will be given effect over performance owed by their nationals in another state's territory under the express terms of contracts enforceable in the other state's courts. Therefore, the deference to foreign governments' sensitivity over their territorial sovereignty, which underlies the Supreme Court's articulation of the act of state doctrine, is not a compelling factor here. Moreover, such deference is inappropriate in the face of the strong conflicting interests of the United States in the cooperative system for dealing with international debt problems.

Second, application of the act of state doctrine to a debt payable in a forum outside the sovereign's territory would have unfortunate ramifications beyond the instant case. A precedent would be established for requiring denial of enforcement of a foreign debtor's obligations whenever its government so decided, whatever the surrounding circumstances, for example, where the

debtor country had openly repudiated the underlying obligation. Thus, there are compelling policy reasons for not extending the act of state doctrine to the facts of this case.

Finally, the act of state doctrine should not be applied in this case because such application does nothing to further the recognized underpinning of the doctrine: the constitutional requirements of separation of powers under which the Judicial Branch avoids interference with the prerogatives of the Executive Branch by not sitting in judgment on a foreign government's action. Where a case can be decided without the need for a court to judge the validity of a foreign governmental action, the act of state doctrine is inapplicable. The plaintiff's claim in this case does not hinge on whether the Costa Rican debtor banks have been (1) validly denied foreign exchange for making payments under the loan agreements or (2) validly barred from making payments by the act of a sovereign government having jurisdiction over those banks and its own foreign exchange reserves. It is an uncontroverted fact in this case that the foreign banks were denied foreign exchange and barred from making such payments by the Costa Rican decrees. Instead, the only issue is whether the Costa Rican decrees constitute an equitable defense cognizable in an action in the federal court in New York.[19] Resolution of that issue does

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[19] The United States takes no position on that issue; however, it seems questionable that such a defense is available under New York law. See J. Zeevi & Sons v. Grindlays Bank, 37 N.Y.2d (CONTINUED)

not require the court to sit in judgment on the Costa Rican decrees. There is accordingly no reason why the act of state doctrine should be applied in this case.

CONCLUSION

For the foregoing reasons, neither the concept of international comity nor the act of state doctrine requires dismissal of this case.

Respectfully submitted,

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19 (FOOTNOTE CONTINUED)

220, 228, 371 N.Y.S.2d 892, 899, 333 N.E.2d 168, 173, cert. denied, 423 U.S. 866 (1975).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 1984, I served the foregoing brief by causing copies to be mailed, postage prepaid, to:

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